NO. 588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

HENDERSON MILOM, *Petitioner*,

v.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

MARVIN A. JERSILD
Room 1236
LaSalle Street Station
Chicago, Illinois
Attorney for Respondent.

MARTIN J. KEATING
Room 1236
LaSalle Street Station
Chicago, Illinois
Of Counsel.

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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OPINION BELOW

The judgment of the United States District Court was entered on December 7, 1956. It is not reported but will be found on page 36 of the record filed with the Court of Appeals below. The opinion of the United States Court of Appeals for the Seventh Circuit, reversing said judgment, was filed on September 27, 1957, and is reported in 248 Fed. 2nd 52. The ruling will be found in Appendix A of the petition.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on September 27, 1957. The petition for a writ of certiorari was filed on December 26, 1957. Jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code.

QUESTIONS PRESENTED

1. Was there any evidence to support the only charge of negligence presented to the jury that the Respondent maintained and provided the Petitioner with defective ice tongs?

2. Is a Court of Appeals stripped of its power of review in cases arising under the Federal Employers' Liability Act when no evidence of negligence by the employer is presented on behalf of the employee?

STATUTE INVOLVED

The pertinent provision of the Federal Employers' Liability Act (45 U.S.C. Sec. 51) is set out in Appendix D in the petition.

STATEMENT

This action was brought by Henderson Milom, Petitioner, a dining car waiter in the employ of Respondent, for injuries alleged to have been received during the course of his employment on November 16, 1954. (R. 9-13)

Petitioner was lifting a block of ice, weighing fifty pounds, from the floor of a dining car to a shelf, with a pair of ice tongs supplied by Respondent. (R. 73-74) When the ice had been lifted about three feet, the ice slipped in the tongs. (R. 74) Petitioner held onto the tongs with his left hand. The tongs regripped in the ice before it hit

the floor, thereby jerking or snapping his wrist. (R. 75) Petitioner then lifted the ice up onto the shelf. (R. 77)

From the date of the accident until April 4, 1955, approximately five months, Petitioner continued to work for the Respondent in his usual occupation. (R. 93) On April 4, 1955, an operation was performed on Petitioner's hand, and he remained in the hospital for three days. (R. 86) As a result he did not work again until August 1, 1955. (R. 93)

Petitioner had handled ice for Respondent for a period of thirteen years prior to the accident. (R. 91-92) He had looked at the ice tongs prior to the accident but did not inspect them. (R. 92) He did not make a complaint to anyone associated with Respondent, on, before, or after the day of the accident, concerning the condition of the ice tongs. (R. 94) No witness testified that the ice tongs were dull, or otherwise defective. In examining Petitioner, his counsel did not ask him whether the tongs were sharp or dull. Indeed, not one of the factual witnesses at the trial below could testify as to the condition of the tongs used by Petitioner. (R. 53-54, 115)

As far as the record in this proceeding is concerned, the Respondent had no knowledge, actual or constructive, that the condition of the tongs was in issue (R. 94, 115) until receipt of the Summons at the commencement of this action some nine months after the occurrence, August 26, 1955. (R. 1)

A different pair of ice tongs (Pl. X-1) was introduced into evidence by Petitioner. The witness, Edward Clements, testified that the exhibit looked like the tongs used by Petitioner, but could not say it was the same set of tongs. (R. 54) Witness Clements testified that he had seen the tongs used by Petitioner but had not examined them.

(R. 53) When the tongs were first offered into evidence, the trial court properly denied the offer for lack of a foundation. (R. 55)

Petitioner testified that the tongs offered into evidence looked like the tongs used by him at the time of the accident. (R. 77) The tongs were again offered for the purpose of showing them to "conform in physical shape and outline" to the tool used by Petitioner. (R. 77) The tongs were offered to show merely "the outline and configuration" of the tongs used by Petitioner. (R. 77-78) It was agreed that the exhibit was not the set used by Petitioner when injured. (R. 77)

Tongs used on Respondent's cars are part of the standard equipment and are replaced by the pantryman when desired. (R. 116) One point of replacement was at the very yard in which Petitioner was accidentally injured. (R. 116) Petitioner was the pantryman on the car in which he was injured. (R. 66)

REASONS FOR DENYING THE WRIT

Petitioner under "Question II" on page 2 of the Petition has raised for the first time the possibility that the tongs in question were "undersized." However, once interjecting that unfounded assertion into this Court, he fails to pursue the allegation further, as well does he fail to cite a record reference for the benefit of this Court. Nowhere in the record of this proceeding is there any reference, directly or indirectly, as to the adequacy of the size of the tongs, indeed, there is no evidence as to the condition of the tongs.

The opinion of the Court below is in accord with the decisions of this Court. The Court of Appeals confined itself to the narrow ground of review permitted under

the doctrine of *Rogers* v. *Missouri Pacific*, 352 U.S. 500, 77 Sup. Ct. 443 (1957); *Webb* v. *Illinois Central*, 352 U.S. 512, 77 Sup. Ct. 451 (1957); and *Schulz* v. *Pennsylvania Railroad*, 350 U.S. 523, 76 Sup. Ct. 608 (1956).

In the opinion below the Court states:

> ". . . to support an employee's action for damages, there must be proof of employer negligence and proof that it played some part, even the slightest, in producing the injury for which damages are sought. In the case at bar we find no proof of employer's alleged negligence, and hence there cannot arise any question of whether the negligence charge(d) played any part in producing plaintiff's injuries." (Appendix A, p. 4a)

Petitioner's whole argument for the granting of Certiorari is developed around the theory that the points on the tongs introduced in evidence (Pl. X1) are as sharp or dull as the points on the tongs in use at the time of the accident. Therefore, argues Petitioner, there is evidence in the record to show negligence on the part of the Respondent.

This argument ignores the only evidence present in the record pertaining to the question of whether Respondent "maintained and provided the plaintiff with defective tongs . . .", the only charge of negligence in Petitioner's amended complaint not abandoned or dismissed.

The Petitioner criticizes the opinion of the Court of Appeals, because that court placed much emphasis upon the fact that no one testified that the tongs were dull. The failure of this necessary testimony is excused by Petitioner with his assertion that the jury had an opportunity to see the tongs offered in evidence. After viewing the exhibit, according to Petitioner, the jury then decided the tongs used by Petitioner were dull. This reasoning is the

result of an outrageous distortion of the evidence presented in the trial below.

Petitioner attempted to introduce into evidence a set of tongs without a foundation as to the origin or previous use made of the exhibit. After failing in this attempt, the exhibit was admitted into evidence with these restrictions:

> Q. Mr. Milom, I will ask you to look at Plaintiff's Exhibit 1 for identification, and I will ask you whether or not Plaintiff's Exhibit 1 for identification conforms in physical shape and outline to the tongs that you used on the occasion in question?
>
> "A. Exactly, sir, except for maybe a little more paint or a little more rust, or less paint or less rust.
>
> "Mr. Wykell: I will reoffer in evidence Plaintiff's Exhibit 1 for identification.
>
> "Mr. Keating: Your Honor, I have no objection to counsel's offer if it is agreed and understood that these are not the tongs.
>
> "Mr. Wykell: Oh, definitely.
>
> "Mr. Keating: That they are similar tongs?
>
> "Mr. Wykell: Definitely. They are merely shown to show the outline and configuration.
>
> "The Court: They may be received.
>
> "Mr. Keating: I withdraw the objection I made yesterday." (R. 77-78)

After this stipulation as to the limited purpose for which the tongs were admitted into evidence, Petitioner now argues that the condition of the points on the exhibit in question can be compared with the points on the instrument used by Petitioner. On page 5 of the petition, it is argued that the jury could make the same use of a photograph of the original tongs as could be made of a set of

tongs admitted for the limited use of showing outline and configuration.

The fallacy of the argument of Petitioner is pointed up by the fact that none of the witnesses could, or did, testify as to the sharpness of the points on the original tongs. If no one testified as to the condition of the points on the original tongs, because no one had knowledge of that particular fact, then it is obvious that an exhibit, comprising a different set of tongs, cannot in any way be used to demonstrate comparison with an unknown fact.

Petitioner did not, and could not, testify as to the condition of the tongs used by him. His failure in this respect was due to his lack of knowledge of the material fact now sought to be established by counsel's argument concerning the exhibit in evidence. At the trial below, Petitioner testified as follows:

> "Q. Mr. Milom, did you look at or inspect the tongs prior to using them on the date of the accident?
>
> "A. I looked at the tongs, but I didn't inspect them, sir.
>
> "Q. Did you inspect them after the accident?
>
> "A. No, sir." (R. 92)
>
> "Q. Did you make a complaint to anyone associated with the railroad ever, either on the day of the accident or before, concerning a condition of ice tongs? . . .
>
> "A. No, sir." (R. 93-94)

The record clearly demonstrates that Petitioner's exhibit was admitted into evidence to demonstrate the *type* of tool used by him and not to show its *condition*. Petitioner is now trying to establish his necessary evidence by a subterfuge and misstatement of the purpose of the exhibit in question. It does not appear appropriate that evidence

necessary to sustain a jury verdict may be supplied for the first time on appeal to this Court.

Petitioner tacitly recognizes the complete lack of evidence in this record which would show that employer negligence played some part, even the slightest, in producing the injury for which damages are sought, *Rogers* v. *Missouri Pacific Railroad Company*, 352 U.S. at 508. Consequently, certiorari is sought on the theory that the jury could find negligence on the part of the Respondent by comparing the points on the tongs in evidence with the points of unknown sharpness on the tongs used by Petitioner. As has been previously pointed out, since no testimony was offered as to the sharpness of the points on the tongs used by Petitioner, the jury had no evidentiary basis for comparison.

CONCLUSION

For the foregoing reasons demonstrating the complete lack of evidence of employer negligence, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MARVIN A. JERSILD,
Attorney for Respondent

MARTIN J. KEATING,
Of Counsel